

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

v.

JOSE LUIS KELLY,

Defendant.

Crim. No. 18-621 (ADC)

ORDER

Defendant José Luis Kelly filed a motion to suppress on March 4, 2019, **ECF No. 32**, twelve days past the February 20, 2019 deadline imposed by the Court for filing the motion, **ECF No. 26**, without displaying the degree of responsibility required by applicable rules requesting, if necessary, for a timely extension of time. Counsel completely misstates the Court's order and statements at the February 11, 2019 conference. In his pleading, counsel also misconstrues the record. At the last conference, the Court ordered the government to disclose the information requested by counsel in spite of the government's objection. By means of the Confidentiality Order, counsel was precluded from revealing any regular strategic information or mechanism used by the government to surveil the area. The fact that the agents were nearby or at Street 4 in Capetillo Ward remains a matter of record.

Counsel offers no justification for his untimely filing, though the record indicates that counsel obtained the confidential information that is the subject of the suppression motion from the government on February 13, 2019. **ECF Nos. 26, 27, 29**. Regardless of the issues of timeliness of the filing, the Court **DENIES** the motion to suppress on the merits. **ECF No. 32**.

Defendant is charged with one count of possession with intent to distribute cocaine base (“crack”) in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); one count of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A); and one count of possession of a firearm by a prohibited person, specifically an alien unlawfully in the United States in violation of 18 U.S.C. § 922(g)(5)(A). **ECF No. 9.** The charges arise out of Puerto Rico Police Department agents’ observations of defendant engaging in what appeared to be a drug transaction while agents conducted surveillance in the Capetillo Ward in Rio Piedras, Puerto Rico on September 7, 2018 around 11:00 a.m. **ECF No. 1-1** at 1. Specifically, the agents indicated they observed defendant pull a clear plastic vial with suspected crack cocaine from a brown paper bag and hand it to another individual. *Id.* at 2. The agents approached the individuals engaged in the transaction, identifying themselves as law enforcement. *Id.* This prompted defendant to flee on foot. *Id.* The agents gave chase, during which time they observed defendant momentarily bend down beside a pickup truck. After detaining defendant, agents returned to the pickup truck and discovered in the area where they observed defendant briefly bend down, a brown paper bag containing thirty-two clear plastic vials of crack cocaine and a Smith & Weston firearm, model MP 40 with serial number HRE-9665, that was loaded with fourteen rounds of .40 caliber ammunition. *Id.* Agents uncovered two additional baggies of cocaine and \$236 in cash on defendant’s person while conducting a search incident to arrest. *Id.*

The motion to suppress challenges the agents’ underlying observation of a drug transaction that prompted their decision to approach. **ECF No. 32.** Specifically, defendant argues

that the agents observations were simply impossible based on the government agents surveillance and location and defendant's relative position on the street. *Id.* at 2–3.

The Fourth Amendment protects against unreasonable seizures, including seizure of the person. *California v. Hodari D.*, 499 U.S. 621, 624 (1991). An arrest is “the quintessential ‘seizure of the person’ under our Fourth Amendment jurisprudence.” *Id.* “An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.” *Id.* at 626 (emphasis in original). This standard “does not remotely apply . . . to the prospect of a policeman yelling ‘Stop, in the name of the law!’ at a fleeing form that continues to flee. That is no seizure.” *Id.* To effectuate a formal arrest, officers must have probable cause to believe that a crime has been committed. *U.S. v. Rasberry*, 882 F.3d 241, 246–47 (1st Cir. 2018), *cert. denied*, 2018 WL 3575762 (U.S. Dec. 3, 2018). It is also a prerequisite “for a de facto arrest.” *Id.*

A person's presence in a known high-crime area, without more, is not enough to support a reasonable suspicion that a person is committing a crime. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (citing *Brown v. Texas*, 443 U.S. 47, 52 (1979)). However, “nervous, evasive behavior,” such as “unprovoked flight upon noticing the police,” “is a pertinent factor in determining reasonable suspicion.” *Id.* “Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” *Id.* An evaluation of reasonable suspicion is a fact-sensitive inquiry that “must be performed in real-world terms.” *U.S. v. Ruidiaz*, 529 F.3d 25, 29 (1st Cir. 2008). It is “a practical, commonsense determination—a determination that entails a measurable degree of deference to the perceptions of experienced law enforcement officers.” *Id.* (citations omitted). “[N]o direct link between the

suspect and the suspected criminal activity need be forged in order to achieve reasonable suspicion.” *Id.*

Defendant misidentifies the point at which he was detained in this scenario. Here, police stated they observed a drug transaction. To confirm their observation they identified themselves as law enforcement as they approached the defendant. Defendant fled on foot and discarded items under a truck. Agents did not detain defendant for Fourth Amendment purposes until they had observed this additional suspicious behavior. Defendant does not argue that his flight and momentary crouch beside the truck fails to establish reasonable suspicion. More so, there is no indication or challenge by defendant that agents arrested him before they retrieved and identified the items discarded under the truck as contraband. Actually, such actions presumably will have made the defendant’s chase and apprehension futile. Thus, irrespective of the agents’ initial observation of a suspected drug transaction between defendant and another individual, defendant’s decision to flee and discard items under a truck provided agents with reasonable suspicion to detain him. The agents’ subsequent recovery of the drugs and weapon discarded under the truck provided probable cause to effectuate his arrest. Accordingly, the motion to suppress is **DENIED**. ECF No. 32

SO ORDERED.

At San Juan, Puerto Rico, on this 6th day of March, 2019.

S/AIDA M. DELGADO-COLÓN
United States District Judge